

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Griffin, P.J., Hood and Sawyer, J.J.

NATIONAL WILDLIFE FEDERATION; UPPER
PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiff-Appellee,

Supreme Court No. 121890

v

CLEVELAND CLIFFS IRON COMPANY; EMPIRE
IRON MINING PARTNERSHIP,

Defendant-Appellant,

Court of Appeals No. 232706

Marquette County Circuit Court
No. 00-037979-CE

and

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, a Michigan
executive agency, and RUSSELL J HARDING,
Director of Michigan Department of Environmental
Quality,

Defendant-Appellee.

BRIEF ON APPEAL – APPELLEE (ERRATA)

ORAL ARGUMENT REQUESTED



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The following three pages of Appellee Michigan Department of Environmental Quality's Brief on Appeal (pp 1, 2, and 4) have been corrected to provide citations to Appellant's Appendix. The six citations to the record on these pages are the only references to the record in Appellee's Brief on Appeal.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

This case presents the question of whether the Legislature may confer standing to a person that would not have standing under the judicial test adopted by this Court in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 737; 629 NW2d 900 (2001). It arises in the context of National Wildlife Federation's (NWF) attempt to bring suit pursuant to the "Michigan Environmental Protection Act" (MEPA) now Part 17 of the Natural Resources and Environmental Protection Act (NREPA) MCL 324.1701 *et seq.*, and that act's express grant of standing to "any person."

Defendant-Appellant Cleveland Cliffs Iron/Empire Mining Partnership's (CCI) Statement of Proceedings and Facts is accurate but incomplete in that it does not fully set forth the role and position of the Michigan Department of Environmental Quality (MDEQ), its codefendant and now an Appellee in this case.

MDEQ was made a defendant in this case since it issued an environmental permit to CCI to expand its mining operations. (App 107a-110a) When NWF brought this MEPA action in the Marquette Circuit Court, it had already invoked administrative review under the substantive permitting statutes, and MDEQ was prepared to defend its permitting decision in the context of those administrative proceedings. (App 497a)

In the Marquette Circuit Court, MDEQ argued that NWF had standing to bring the suit, and that the real issue facing the court was whether that NWF had satisfied the requirements for temporary injunctive relief. (App 762a-766a) On this question, MDEQ took no position. It also pointed out to the court that administrative proceedings had been initiated, and that the court could keep jurisdiction to review the outcome of those proceedings. *Id.*

The Circuit Court dismissed the MEPA suit for "lack of standing" rather than failure to meet the requirements to obtain injunctive relief, although the Court was unclear why it

concluded that plaintiffs lacked standing. In addressing standing, the Circuit Court expressed dissatisfaction with the affidavits submitted:

I'm not going to take the time to go through the affidavits one by one, but I think that anybody who reads them will see how often the words or the phrases "I am concerned" without any stated basis in those affidavits for the reason for being concerned. I am concerned that there will be an impact. I am concerned there won't be as many birds. I am concerned that there has been a diminishment of the fishery in Goose Lake, and I'm concerned that the mining activities will further diminish the fishery. That's not enough.

The affidavits in this situation do not give or do not demonstrate that the individuals have standing, as least not to this Court. And, consequently, that standing cannot be passed on, so to speak, to the two organization plaintiffs.
[App 782a]

The Court also determined that plaintiffs had not made a prima facie showing that the conduct of the defendant has polluted, impaired or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in those resources. *Id.* Then, addressing the elements required for a preliminary injunction, the Court found that plaintiffs would suffer irreparable injury of a minor nature:

I think that there will be some irreparable injury, but I think that based on the proofs that I heard that irreparable injury will be of a very minor nature. . . [T]here really hasn't been any demonstration that the irreparable injury will be of such importance and severity that we are going to lose an endangered species, which the Court would find would be a much more serious situation. [App 783a-784a]

NWF appealed that decision to the Court of Appeals, asserting standing both under the "traditional test" for standing and the broad grant of standing under MEPA. In the Court of Appeals, MDEQ filed its brief to indicate its view that MEPA does indeed confer standing to any person alleging that the conduct of the defendant is likely to pollute, impair or destroy the natural resources of the State, and therefore supported NWF's position.

MDEQ addresses this Court as an Appellee, having taken the position it did in the Court of Appeals and having opposed CCI's Application for Leave to Appeal.

general welfare of the people. *The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.* (Emphasis supplied.)

The Court of Appeals below recognized that MEPA statutorily confers standing on plaintiffs such as NWF, an environmental protection group with a recognized reputation for environmental advocacy on behalf of its members: "In light of the plain language of the statute and its consistent construction conferring standing to any person, we decline defendants' invitation to read in an additional requirement of compliance with non-statutory standing prerequisites." (App 791a)

The Supreme Court granted leave in this case, broadly framing the issue: "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing."

In the context of this specific case, the DEQ views the essential question as whether MEPA can constitutionally confer standing on all persons claiming that specific conduct of a defendant is causing or likely to cause pollution, impairment or destruction of the state's natural resources or harms to the public trust in those resources. Thus, MEPA is more properly viewed as substantively vesting each citizen with a legally cognizable interest in the natural resources of the State.

MEPA is fundamentally consistent with traditional tests courts have used to determine standing, since it essentially recognizes that all persons are legally injured by the impairment of public trust resources. Additionally, the broad grant of authority to the Legislature under art 4, § 52 constitutes sufficient constitutional authority for the Legislature to grant standing to persons who do not meet the "judicial test" for standing. Finally, a review of the legal precedent, and the historical materials, establishes that the Legislature does have authority to "abrogate" the Court's traditional tests for standing, where, there is a constitutional mandate to provide for the